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No. 81-1839

IN THE

Supreme Court of the United States

October Term, 1981

MINNEAPOLIS STAR AND TRIBUNE COMPANY,
Appellant,

vs.

MINNESOTA COMMISSIONER OF REVENUE,
Appellee.

ON APPEAL FROM THE SUPREME COURT
OF THE STATE OF MINNESOTA

APPELLEE'S MOTION TO DISMISS

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QUESTION PRESENTED

Whether the use tax imposed as part of Minnesota's general sales and use tax law by Minn. Stat. § 297A.14, on purchases of paper and ink exceeding $100,000 in cost which are used in the production of all "publications"[1] not taxed when sold as final products, is constitutional under the equal protection guarantees of the Fourteenth Amendment, and under the freedom of press guarantees of the First Amendment as applied to the states by the Fourteenth Amendment.

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[1] The term 'publication" is statutorily defined by Minn. Stat. § 297A.25, subd. 1(i), as any type of publication "regularly issued at average intervals not exceeding three months" including "a legal newspaper as defined by Minn. Stat. 1965, Section 331.02".

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MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Rules of the United States Supreme Court, hereby moves the Court to dismiss the appeal herein on the grounds that the questions presented are so insubstantial as not to need further argument.

OPINION BELOW

The opinion of the Minnesota Supreme Court is reported in 314 N.W.2d 201, and reproduced in the Appendix to Jur. Stat. (A. 1 to A. 19).[2]

CONSTITUTIONAL PROVISIONS AND STATUTES

The applicable provisions of the First and Fourteenth Amendments to the United States Constitution are set forth by Appellant. (Jur. Stat., p. 2).

The actual statute under constitutional attack is the third paragraph of Minn. Stat. § 297A.14. However, to be properly understood this statute must be read in conjunction with Minn. Stat. § 297A.25, subd. 1(i). During all the tax periods directly at issue herein (from January 1, 1974 through May 31, 1975), these statutes read as follows:

> 297A.14 USING, STORING OR CONSUMING TANGIBLE PERSONAL PROPERTY; ADMISSIONS; UTILITIES. For the privilege of using, storing or consuming in Minnesota tangible personal property, tickets or admissions to places of amusement and athletic events, electricity, gas, and local exchange telephone service purchased for use, storage or consumption in this state, there is hereby imposed on every person in this state a use tax at the rate of four percent of the sales price of sales at retail of any of the aforementioned items made to such person after October 31, 1971, unless the

[2] Throughout this motion, the abbreviation "Jur. Stat." means the Appellant's Jurisdictional Statement; the abbreviation "A. —" is a reference to the Appendix to Jurisdictional Statement.

tax imposed by section 297A.02 was paid on said sales price.

Motor vehicles subject to tax under this section shall be taxed at the fair market value at the time of transport into Minnesota if such motor vehicles were acquired more than three months prior to its transport into this state.

Notwithstanding any other provisions of sections 297A.01 to 297A.44 to the contrary, the cost of paper and ink products exceeding $100,000 in any calendar year, used or consumed in producing a publication as defined in section 297A.25, subdivision 1, clause (i) is subject to the tax imposed by this section. (Emphasis added.)

297A.25 EXEMPTIONS. Subdivision 1. The following are specifically exempted from the taxes imposed by sections 297A.01 to 297A.44:

* * * * *

(i) The gross receipts from the sale of and storage, use or other consumption in Minnesota of tangible personal property (except as provided in section 297A.14) which is used or consumed in producing *any publication regularly issued at average intervals not exceeding three months,* and any such publication. *For purposes of this subsection, "publication" as used herein shall include, without limiting the foregoing, a legal newspaper as defined by Minnesota Statutes 1965, Section 331.02,* and any supplements or enclosures with or part of said newspaper; and the gross receipts of any advertising contained therein or therewith shall be exempt. For this purpose, advertising in any such publication shall be deemed to be a service and not tangible personal prop-

> erty, and persons or their agents who publish or sell such newspapers shall be deemed to be engaging in a service with respect to gross receipts realized from such news-gathering or publishing activities by them, including the sale of advertising. Machinery, equipment, implements, tools, accessories, appliances, contrivances, furniture and fixtures used in such publication and fuel, electricity, gas or steam used for space heating or lighting, are not exempt. (Emphasis added.)

In addition to the above statutes, the Minnesota Department of Revenue has issued a regulation interpreting the statutory language. This regulation, promulgated pursuant to authority granted in Minn. Stat. § 297A.29, is found in 13 Minn. Code of Agency Rules, Tax S&U 409, and is reproduced in the Appellee's Appendix hereto.

STATEMENT OF THE CASE

This is a direct appeal from the decision of the Minnesota Supreme Court upholding the constitutionality of the third paragraph of Minn. Stat. § 297A.14. The law imposes a use tax on the purchase and consumption of all paper and ink products exceeding $100,000 in annual cost and used in the production of "publications" which are not taxed when sold as final products.

The facts pertaining to the legislative history of this use tax are important to the case and are essentially undisputed. When the Minnesota legislature first enacted the general sales and use tax in 1967, a tax was laid upon the sale or use of virtually all tangible personal property in the state of Minnesota. Minn. Stat. (1967) §§ 297A.02 and 297A.14. Notable exemptions were for food, medicine and clothing. Minn. Stat.

(1967) § 297A.25, subd. 1, paras. (a), (b) and (g). In addition, sales of certain (but not all) publications, as well as the paper and ink which went into producing them, were statutorily exempted from the general sales and use tax. Minn. Stat. (1967) § 297A.25, subd. 1(i).

The category of exempt "publications" is statutorily defined to include newspapers and any other written or printed matter regularly issued at average intervals not exceeding three months. Minn. Stat. § 297A.25, subd. 1(i). Thus, besides newspapers, tax exempt "publications" would include magazines, advertising supplements, shoppers guides, house organs, trade and professional journals and serially issued comic books. *See* 13 Minn. Code of Agency Rules, Tax S&U 409B (printed in the Appellee's Appendix hereto). In addition, monthly advertising circulars printed and distributed by wholesale and retail merchants have been construed to be tax exempt "publications" within the meaning of Minn. Stat. § 297A.25, subd. 1(i). *United Hardware Distributing Company v. Commissioner of Revenue*, 284 N.W.2d 820 (Minn., 1979). However, other printed materials such as books, political campaign newsletters and law briefs were not exempted. 13 MCAR Tax S&U 409B.

"Publications" remained completely free from the sales and use tax between 1967 and 1971. In that year, however, the Minnesota legislature amended Minn. Stat. § 297A.25, subd. 1(i), to remove the exemption which had previously been granted on the purchase of paper and ink for use in printing tax exempt publications. Thereafter, all producers of tax exempt "publications" in Minnesota, large or small, rural or urban, had to pay a sales or use tax on the paper and ink which they purchased.

This tax remained in effect, unchallenged by any court proceeding, until the 1973 Minnesota legislature again amended

the law in Minn. Laws 1973, ch. 650, art. XIII, §§ 1-2. That amendment provided that the first $100,000 in purchases of paper and ink was to be excluded from the measure of taxation effective January 1, 1974.

There is no evidence whatsoever on this record to show that Minnesota's legislature, in enacting the use tax at issue herein, had any motive other than that of raising revenue; or had any sort of malicious or improper purpose towards Minnesota's large-circulation newspapers. Indeed, no such allegations were ever made by the Minneapolis Star & Tribune (hereinafter, "Star Tribune").

Appellant Star Tribune is a company engaged in the business of printing newspapers, which are included in the class of exempt "publications" under Minn. Stat. § 297A.25, subd. 1(i), and are therefore not subject to Minnesota's ordinary sales and use tax when sold as final products. Accordingly, under the statute in question, Star Tribune paid a use tax to Minnesota on its purchases of all paper and ink exceeding $100,000 in annual cost. In the nearly one and a half years from January 1, 1974 through May 31, 1975, the Star Tribune paid a total of $874,265.04 in such taxes.

The Star Tribune commenced this action in August, 1975, seeking a refund of the taxes paid. Over four years later, on January 25, 1980, Star Tribune eventually filed a motion for summary judgment. On May 30, 1980, the state district court granted summary judgment in favor of the Star Tribune declaring the use tax in question unconstitutional. (A. 49 to A. 66).

The Minnesota Commissioner of Revenue (hereinafter, "Commissioner") appealed from this ruling to the Minnesota Supreme Court, which reversed the district court's decision on December 17, 1981.

ARGUMENT

THE DECISION OF THE MINNESOTA SUPREME COURT IS PLAINLY CORRECT AND THE APPELLANT'S ARGUMENT TO THE CONTRARY FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

A.

Whether the equal protection and First Amendment questions in this case are treated separately, or together as was done by the Court below, 314 N.W.2d at 205 (A. 8), it is clear that the use tax at issue herein is, under already well-settled principles, a perfectly constitutional exertion of Minnesota's sovereign and inherently broad power of taxation.[3] Consequently, the questions presented are not the sort of important and substantial questions which would warrant the attention of this Court.

The tax in question is an integral part of Minnesota's general sales and use tax law,[4] and on its face the tax applies not just to newspapers, but to all printers of tax exempt "publications" as defined in Minn. Stat. § 297A.25, subd. 1(i). The application of the $100,000 exclusion feature of the tax is not based upon any arbitrary criteria such as circulation or sub-

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[3] As this Court said in *Madden v. Kentucky*, 309 U.S. 83, 93 (1940):

> In the states, there reposes the sovereignty to manage their own affairs except only as the requirements of the Constitution otherwise provide. Within these constitutional limits the power of the state over taxation is plenary.

[4] Thus the rate of the tax cannot be raised without also raising the tax rate on all other businesses and persons subject to the sales and use tax in Minnesota. For example, the recent rate increase from 4% to 5%, cited by the Court below in footnote 1 of its opinion (A. 2), was part of a general rate increase for all sales and use taxes in Minnesota.

ject matter, but is instead available equally to all publications subject to the tax, including the Appellant Star Tribune. In fact, Star Tribune received two such $100,000 exclusions during the periods at issue herein by reason of its publishing both a morning and an evening paper. *See* 314 N.W.2d at 203, fn. 3. (A. 4). Nor is there anything in the record of this case to support a finding, or even an inference, that the Minnesota legislature adopted this tax as a means of penalizing or curtailing the publication of the Appellant's newspapers in particular, or large newspapers in general, or for that matter any publishing activity at all.

In fact the basic use tax on paper and ink, as first adopted in 1971 without the $100,000 exemption (A. 77), clearly applied to all publications, thus precluding any notion that the legislature was out to "get" big newspapers. The $100,000 exclusion complained of so strenuously by Star Tribune and by *amici* was not enacted until 1973 (A. 84). But rather than simply opposing the $100,000 exclusion, Star Tribune seeks, for obvious reasons, to have the entire tax thrown out; even though there is no question that the basic use tax itself applies equally to all tax exempt publications.

It can therefore be seen that the present case is far different from that in the leading case of *Grossjean v. American Press Co.*, 297 U.S. 233 (1936). The peculiar Louisiana statute at issue in *Grossjean* was not only a direct license tax upon publications for the privilege of engaging in the business of selling advertising, but it was also imposed solely upon the basis of size of circulation, 297 U.S. at 240, a classification which by its nature could not apply to all publications equally. Moreover, the history and setting of the Louisiana license tax clearly showed that it was nothing more than a vehicle used by that state's political "boss", Huey Long, for the deliberate and open

purpose of muzzling a selected group of opposition newspapers. As this Court stated in its *Grossjean* opinion: "[The tax] is bad because, in light of its history and of its present setting, it is seen to be a deliberate and calculated device in the guise of a tax" enacted "with the plain purpose of penalizing the publishers and curtailing the circulation of a selected group of newspapers." 297 U.S. at 250-251.

Both Star Tribune and *Amicus* Minnesota Civil Liberties Union (hereinafter, "MCLU") would like to minimize or ignore this important aspect of the *Grossjean* case.[5] However, the above quoted language makes it perfectly clear that the *Grossjean* Court was well aware of the political situation and illegitimate purpose behind the enactment of the Louisiana license tax, and that this Court viewed itself as a bulwark against such abuses of a state's taxing power.

Moreover, subsequent decisions by this Court, usually in distinguishing the *Grossjean* case, have referred to the narrowly drawn aspects and clearly abusive purpose of the Louisiana license tax. Thus, in *Mabee v. White Plains Publ. Co.*, 327 U.S. 178 (1946), a case which upheld the application of the Fair Labor Standards Act to a small daily newspaper even though small weekly and semiweekly newspapers were expressly exempted from the Act's provisions, this Court said:

> The *Grosjean* case is not in point here. There the press was singled out for special taxation and the tax was graduated in accordance with volume of circulation. No such vice inheres in this legislation. . . . [T]he exemption of small weeklies and semi-weeklies *is not a "deliberate and calculated device" to penalize a certain group of newspapers.* (Emphasis added.)

327 U.S. at 184.

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[5] *See* Jur. Stat. at 11-12; and Br. of *Amicus* MCLU at 27-29.

In *Pittsburgh Press Company v. Pittsburgh Commission on Human Relations*, 413 U.S. 376 (1973), a case upholding against First Amendment attack a municipal human relations ordinance which prohibited newspapers from carrying sex designated help wanted ads, this Court first recognized the *Grossjean* case as one of the leading authorities in the area, 413 U.S. at 382-383, but then distinguished it by saying quite simply:

> [N]o suggestion is made in this case that the Ordinance was passed with any purpose of muzzling or curbing the press.

413 U.S. at 383.

See also Houchins v. KQED, Inc., 438 U.S. 1 (1978), where this Court reiterated that:

> *Grosjean* involved a challenge to a state tax on advertising revenues of newspapers, *the "plain purpose" of which was to penalize the publishers and curtail the publication of a selected group of newspapers.* (Emphasis added.)

438 U.S. at 9.

Other state courts besides the Minnesota Supreme Court have stated their views that the *Grossjean* case cannot be read in isolation from its historical setting. *See Lee Enterprises v. Iowa State Tax Commission*, 162 N.W.2d 730, 755 (Iowa, 1968); and *Giragi v. Moore*, 49 Ariz. 74, 85-86, 64 P.2d 819, 823 (Lockwood, J., concurring), *appeal dismissed*, 301 U.S. 670 (1937).

In direct contrast to the situation in *Grossjean*, is the case at hand, where there is absolutely no evidence to show that Minnesota's use tax on paper and ink was passed to single out a particular newspaper or group of newspapers for unconstitu-

tional muzzling.[6] On the contrary, the purpose of the law was to raise revenues under a general system of taxation.

As the Minnesota Supreme Court correctly stated in its opinion below:

> The history and setting of section 297A.14, reviewed at the start of this opinion, reveal that it is not a deliberate and calculated device in the guise of a tax imposed purposefully to restrict dissemination of the news and opinions appearing in newspapers distributed by publishers such as Star Tribune. It is part of a general system of sales and use taxation to which most goods (other than food, clothing, and medicine) are subject in Minnesota. Unlike the type of tax found to be unconstitutional in *Grosjean*, sales and use taxes are now commonplace and readily accepted. [citations omitted.] . . . This type of taxation has no "long history of hostile misuse against the freedom of the press."

314 N.W.2d at 207 (A. 12).

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[6] Indeed, if that was its purpose the use tax in question has been singularly unsuccessful in achieving it. Anyone familiar with Minnesota society knows that the newspapers of this state, especially the large dailies, have been vigorously independent in their political reporting; and the Appellant has neither suggested nor presented any evidence to support a conclusion that that tradition has in any way been diminished over the almost eleven years since the use tax on paper and ink was first enacted.

As for the completely unsupported inference in *Amicus* MCLU's brief (pp. 2-3) to the effect that the recent merging of the afternoon Star with the morning Tribune was somehow related to the passage over ten years ago of the use tax herein, it is enough to quote the MCLU's own disclaimer on p. 11 of its brief:

> "It would be too much to claim that the 'big newspaper tax' killed the Star, or was intended to."

We should think so. Especially in view of the fact that the Star was still a viable profit-making operation when its management voluntarily decided to merge it with the Tribune. *See* Minneapolis Star, March 24, 1982, p. 5A, col. 2.

The "history and setting" referred to above by the Minnesota Supreme Court is open for anyone to see, and it amply justifies the present use tax as a general revenue raising measure.

In 1971 the Minnesota legislature had before it a comprehensive proposal for reforming and redistributing the overall state and local tax burden. Simply stated, the plan called ". . . for the state to take over a large share of the school-financing burden from local districts, mandating a huge increase in the state budget." *See Minnesota: A State That Works*, TIME, August 13, 1973, pp. 24-35 at 35. The issue was a major one in Minnesota at that time, so much so that the question could not be resolved during the legislature's regular session that year.

Instead, the legislature had to be called into an extra session, the result of which was the passage of Minn. Laws 1971, Ex. Sess., c. 31. This law was entitled: "An act relating to the organization, operation and financing of state and local government; appropriating money therefor; . . . ." A reading of that 1971 law reveals on its face that among the objects it sought to obtain was the large scale reduction of local property tax burdens, a corresponding increase in state aids to local governments and school districts to make up the difference, and a large scale increase in state-wide tax revenues to finance the program.

In order to raise new revenue to fund this new program the overall sales and use tax rate was raised from three to four percent (Minn. Laws 1971, Ex. Sess., c. 31, art I, § 2) (A. 73-74), and some sales tax exemptions which had previously been granted were repealed. One of these repealers did nothing more than eliminate the previous exemption for paper and ink products used or consumed in the production of otherwise ex-

empt publications. Minn. Laws 1971, Ex. Sess., c. 31, art I, § 5. (A. 77).

Thus, in its search for additional state-wide revenue the 1971 legislature simply imposed a use tax upon a class of previously untaxed property for the perfectly valid purpose of funding the state's new property tax reduction and local educational aid program.

The importance of this tax reform program was widely heralded, and it became popularly known as "The Minnesota Miracle" in providing equal educational opportunity to all Minnesotans. As described in *Minnesota: A State That Works*, TIME, August 13, 1973 at p. 35:

> With such state revenues [Minnesota] increased state aid for education from 43% to 63% in the first year, and now to 70%, thereby decreasing the real estate tax burden by an average of 11.5%.
>
> It was a major piece of social legislation, for within a six-year period, it will virtually equalize the per-pupil spending for education throughout the state and thus go a long way toward equalizing education in the cities, suburbs and rural areas.

Against this clear evidence of the basic use tax being enacted as part of an overall tax reform measure, and for a proper legislative purpose, there is absolutely nothing on record to support a conclusion that this is a forbidden "tax on knowledge" as claimed by the Star Tribune. (Jur. Stat. at 10-14).

Instead, this tax obviously comes within that class of general laws which this Court has on numerous occasions upheld against claims by the media of special privilege under the First Amendment. This Court in *Grosjean* expressly reaffirmed the right of the states to impose ordinary forms of non-

discriminatory taxation upon newspapers and other publishers, saying:

> It is not intended by anything we have said to suggest that the owners of newspapers are immune from any of the ordinary forms of taxation for support of the government.

297 U.S. at 250.

In *Branzburg v. Hayes*, 408 U.S. 665 (1972), a case which held that reporters have no First Amendment right to refuse to testify before state or federal grand juries regarding their confidential news sources, this Court said:

> It is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability. Under prior cases, otherwise valid laws serving substantial public interests may be enforced against the press as against others, despite the possible burden that may be imposed. The Court has emphasized that "[t]he publisher of a newspaper has no special immunity from the application of general laws."

408 U.S. at 682-683.

Accord, Pittsburgh Press Company, supra, 413 U.S. at 382-383. *Cf. Zurcher v. Standard Daily*, 436 U.S. 547, 565-566 (1978) (First Amendment provides to newspapers no greater freedom from proper search warrants than that of the general public); *Nixon v. Warner Communications*, 435 U.S. 589, 609 (1978) (First Amendment grants the press no right to information about a trial superior to that of the general public); *Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (The press has no First Amendment right of access to prisons beyond that afforded the general public).

In particular, the Minnesota Supreme Court reviewed the string of lower court decisions following in the wake of *Grossjean*, 314 N.W.2d at 206-207 (A. 10 to A. 12), and concluded that the Minnesota use tax at issue herein fell within the more numerous class of general non-discriminatory taxes which, although clearly imposed on the press, have nevertheless been upheld over the years against First Amendment challenges. *See, e.g. Giragi v. Moore, supra*; *Arizona Pub. Co. v. O'Neil*, 22 F.Supp. 117 (D.C., 1938), *aff'd* 304 U.S. 543; *Rueben H. Donnelley Corp. v. City of Bellevue*, 283 Ky. 152, 140 S.W.2d 1024 (1940); *City of Corona v. Corona Daily Independent*, 115 Cal. App.2d 382, 252 P.2d 56 (1953); *Territory of Alaska v. Journal Printing Co.*, 135 F.Supp. 169, 15 Alaska 676 (1955); *Tampa Times Co. v. City of Tampa*, 158 Fla. 589, 29 So.2d 368 (1947), *cert. denied* 332 U.S. 749 (1947); *Steinbeck v. Gerosa*, 4 N.Y.2d 302, 151 N.E.2d 170 (1958); and *Lee Enterprises, Inc. v. Iowa State Tax Commission, supra.*

All of these cases are in accord with the principles set forth by this Court in *Grossjean, supra*; and so too is the decision of the Minnesota Supreme Court below. Nothing in the Minnesota Supreme Court's decision serves to diminish *Grossjean* as the primary bulwark protecting the press against "deliberate and calculated device[s] in the guise of a tax," enacted "with the plain purpose of penalizing . . . publishers and curtailing . . . circulation". *Grossjean*, 297 U.S. at 250-251. Since Minnesota's use tax on paper and ink is clearly not such a proscribed form of taxation, it follows that Star Tribune's First Amendment claim based upon *Grossjean* is without merit and should be dismissed.

B.

Similarly, Star Tribune's equal protection claims are also without merit. The Minnesota Supreme Court expressly adopted and correctly applied the strict scrutiny standard of review for this case, 314 N.W.2d at 205 (A. 8); both as to the alleged discrimination between tax exempt "publications" and other industrial users of paper and ink, and as to the alleged discrimination between publishers who purchase over $100,000 in paper and ink annually, and those who purchase less.

But before discussing the correctness of this result, we wish to reiterate our belief that in applying the strict scrutiny standard of review the Minnesota Supreme Court went further than it was required to go. As the Appellee Commissioner vigorously argued below (*See* A. 28 to A. 34), the nature of this use tax as a part of Minnesota's general system of non-discriminatory sales and use taxation means that the strict scrutiny standard simply should not apply, and that instead the traditional "any rational basis" test is the correct standard for review.[7]

Many formulations, sometimes using different language, have been set forth over the years by this Court on the question of when the strict scrutiny standard is to be applied in equal protection cases. But two of the most recent decisions

[7] It was solely in the context of arguing against adoption of the strict scrutiny standard that Appellee's counsel made the statement quoted by Star Tribune in its Jur. Stat. at 8-9 to the effect that "it would be difficult to uphold this particular statute under the strict scrutiny standard of review", after which Appellee's counsel immediately added "It would not be impossible." (A. 34). At oral argument below Appellee's counsel clearly established the context of these remarks when he said "our primary position on the strict scrutiny issue is that strict scrutiny simply doesn't apply here." (A. 28 to A. 29).

have succincily stated the test in clear terms, *Massachussetts Board of Retirement v. Murgia*, 427 U.S. 311 (1976); and *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973). In *Murgia*, 427 U.S. at 312, this Court stated:

> San Antonio School District v. Rodriguez, 411 U.S. 1, 16, 93 S.Ct. 1278, 1287, 36 L.Ed.2d 16 (1973), reaffirmed that equal protection analysis requires strict scrutiny of a legislative classification *only* when the classification *impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.* (Emphasis added).

Since in the present case there is no allegation that a "suspect class" is adversely affected by the use tax on paper and ink, it follows that strict scrutiny can only be invoked if it is shown that the use tax "impermissibly interferes with the exercise of a fundamental right." *Id.*

The record herein fails to establish that the present use tax constitutes any sort of impermissible interference with the freedom of the press. As part of Minnesota's general sales and use tax law, it is but one of many taxes which happen to affect newspapers in some way, *see e.g.*, the income and property taxes which Star Tribune concedes to be proper. However, merely because a general law "affects" a First Amendment protected activity should not, and does not, mean that that law must in all cases be subjected to the strict scrutiny standard of constitutional review. Under *Murgia*, *supra*, the "strict scrutiny" test is invoked only when the law in question "impermissibly interferes" with a fundamental right.

Thus, in *Mabee v. White Plains Pub. Co.*, 327 U.S. 178 (1946), this Court was directly faced with an "equal protection" issue of alleged unconstitutional discrimination in the

Fair Labor Standards Act, between small daily newspapers (who were held to be subject to the Act) and small weekly and semi-weekly newspapers (who were statutorily exempt under the Act).[8] In upholding the constitutionality of this Act, this Court did not find it necessary to apply any sort of strict scrutiny standard of review, but in effect applied an "any rational basis" test. 327 U.S. at 184. Likewise, in *Hadwen, Inc. v. Vermont Dept. of Taxes*, 139 Vt. 37, 422 A.2d 255 (1980), *appeal dismissed* 451 U.S. 977 (1981), the Vermont Supreme Court applied the "any rational basis" test in upholding that state's use tax on ink, newsprint and other supplies used in the publication of a weekly free "Pennysaver", (which the Court held to be a newspaper) against equal protection attack.

Applying the above authorities to the present case, it can be seen that the use tax in question does not interfere at all with the exercise of First Amendment rights, much less impermissibly so. The law is merely part of a general tax upon the sales and use of all tangible personal property in this state and is not subject to strict scrutiny by this Court.

Nevertheless, we agree with the Court below that the use tax is constitutional under any standard of review. Indeed, the fact that the Minnesota Supreme Court went beyond the "any rational basis" standard to apply the higher standard of strict scrutiny, and still found the use tax in issue to be perfectly constitutional, is yet further evidence that the questions presented in this appeal are not substantial enough to warrant the attention of this Court.

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[8] Because the statute in *Mabee* was a federal law, the issue was raised under the Fifth Amendment rather than the Fourteenth Amendment. However, the standards of review under both Amendments are now recognized as virtually identical. *See U.S. Railroad Retirement Board v. Fritz*, 449 U.S. 166 (1980).

C.

Turning first to the question of equal protection as between "publications" and other industrial users of paper and ink, there was an obvious and clear difference between paper and ink used in printing tax exempt "publications", and paper and ink used in the industrial production of non-exempt products. In the former situation the end product (e.g., a regularly issued publication) was statutorily exempt from sales or use tax upon its retail sale to the final consumer under Minn. Stat. (1967) § 297A.25, subd. 1(i). In the latter situation, however, the end product (e.g., pre-printed stationery, maps, books, etc.) was *not* exempt upon its retail sale to the final consumer. The paper and ink going into such products was therefore eventually taxed at the point of retail sale. As the Minnesota Supreme Court correctly stated in its opinion below:

> Nonpublishers pay no use tax on consumption of paper and ink, but the goods they produce are subject to retail sales tax. Theoretically, the value of the paper and ink is reflected in the retail price that forms the basis of the sales tax.
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> * * * * *
>
> By exempting industrial users from the use tax, the legislature was acting in accordance with its general scheme to exempt component parts from the use tax when the completed product is subject to sales tax. *Standard Packaging Corp. v. Commissioner of Revenue*, 288 N.W. 2d 234, 237-38 (Minn., 1979).

314 N.W.2d at 207-208 (A. 13 to A. 14).

It can therefore be seen that, unlike the usual industrial manufacturing situation, paper and ink used for tax exempt

publications escaped sales and use taxation entirely under the statutory scheme in effect between 1967 and 1971. All the tax in question did was to remove this legislatively granted exemption. The sole reason for doing so was to raise revenue by insuring that the cost of such paper and ink would be subjected to taxation at least once during the manufacturing process. This plan of taxation would put the paper and ink used for tax exempt publications on roughly the same plane with the paper and ink used by ordinary industrial manufacturers, the cost of which is eventually subjected to sales and use taxation when the final product is sold at retail.

We fail to see how this scheme can be a greater burden on "publications" than is the imposition of a sales tax upon the nonpublisher's sale of his final product. In fact, the burden is even smaller in the case of tax exempt "publications" because the raw materials going into the product (i.e., paper and ink) are almost invariably of less value than the final product itself, therefore resulting in a lower overall tax burden.

It is immaterial that the Star Tribune pays the use tax as an out-of-pocket expense, while other industrial users of paper and ink simply collect the sales tax from the ultimate consumer. As the Minnesota Supreme Court correctly noted below:

> In all cases, producers of goods are free to assume the burden of any tax or pass some part of it on to consumers in the form of higher retail prices. *See Developments*, 75 Harv. L. Rev. at 994.

314 N.W.2d at 208 (A. 14).

In fact, the tax burden on the Star Tribune under the present use tax is less than that which would result were it truly taxed like other industrial users of paper and ink, i.e.,

by taxing the ultimate sale of its final products. That the Minnesota legislature could impose its sales tax on publications is beyond question in light of the fact that Minnesota's sales tax is a general excise tax upon the sale of all tangible personal property in this state. Minn. Stat. §§ 297A.02 and 297A.01, subds. 3 and 4. Since newspapers are clearly tangible personal property, they are as much subject to a general, non-discriminatory tax upon their sale as is any other item of tangible personal property. Just as publishers of newspapers are subject to other forms of general taxation and regulation, *see Associated Press v. N.L.R.B.*, 301 U.S. 103, 132-133 (1967), so too would they be subject to a general sales tax upon the sale of all tangible personal property.[9]

Star Tribune's assertion to the contrary (Jur. Stat. at 19-20), is clearly erroneous. Nothing in the First Amendment or in the cases cited by Star Tribune mandates that newspapers be exempt from general forms of taxation, any more than churches are constitutionally exempted from taxation by the First Amendment. Exemptions from general taxes for both newspapers and churches are, like all tax exemptions, purely matters of legislative grace insofar as the First Amendment is concerned. In fact, in the case of churches it has been expressly held that there is no First Amendment right to tax exemption on religious grounds. *Parker v. Commissioner of Internal Revenue*, 365 F.2d 792 (8th Cir., 1966), *cert. den.* 385 U.S. 1026; *Universal Liberty in Christ Temple v. U.S.*, 36 AFTR2d 75-5309, 75-5313 (U.S.D.C. Mich., 1975); cf. *Bob Jones University v. Simon*, 416 U.S. 725, 749 (1974).

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[9] It is noteworthy that the sale of books (which are just as much the object of First Amendment protection as are newspapers) have always been subject to Minnesota's sales tax without, to our knowledge, any constitutional challenge in the courts. *See*, 13 MCAR Tax S&U 409B.

Because there is nothing in either the First or Fourteenth Amendments which would prevent the Minnesota legislature from imposing a non-discriminatory sales tax on newspapers, we fail to see how the imposition of a use tax on only their purchases of paper and ink, which is less than the sales tax on final products of other industrial users of paper and ink, is unconstitutional. Even under the strict scrutiny standard of review there is no impermissible discrimination when the burden imposed upon one class (in this case publishers) is actually less than the burden imposed upon other classes.

But Star Tribune complains that there still exist other industrial users of paper and ink (*e.g.*, printers of milk cartons and school textbooks) whose final products are exempt from sales tax, but who are not subjected to the use tax on paper and ink. (Jur. Stat. at 23). The simple answer to this is that the Minnesota legislature is not constitutionally constrained to exempt all items of property from taxation, or none at all. State legislatures have inherently broad powers to create classifications and grant exemptions for the purpose of "fitting tax programs to local needs in order to achieve an equitable distribution of the tax burden". *Madden v. Kentucky*, 309 U.S. 83, 88 (1940). Thus Minnesota is free to judge that such items as food (and the packaging for food), as well as school textbooks, are entitled to remain totally exempt from its general sales and use tax.

D.

The $100,000 exclusion added to the tax in 1973 is also a perfectly constitutional exercise of the state's taxing power. In the first place, there can hardly be a violation of equal protection when a rule of law is applied equally and without discrimination to all who come within its scope.

It would seem axiomatic that equal protection can only be violated if there is some statutory classification which operates in a discriminatory manner. As this Court said in *State of Louisiana v. Resweber*, 329 U.S. 459 (1947):

> So long as the law applied to all alike, the requirements of equal protection are met.

329 U.S. at 465.

In the present case, the $100,000 exclusion applies equally to all producers of tax exempt publications. In effect it is a form of tax credit which is generally applicable to all who come within the act.[10] Each producer of a publication, large or small, is entitled to subtract the same $100,000 from its cost of purchasing paper and ink before calculating the amount of use tax due. In fact, Star Tribune received two such $100,000 exclusions.

Yet, as is the case with all general rules of taxation, it is possible that its application to different persons will result in different tax liabilities. But this does not, in itself, make the general rule unconstitutional, because the Fourteenth Amendment guarantees only equal laws, not necessarily equal results. *Personnel Adm'r. of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). *See Mouledoux v. Maestri*, 197 La. 525, 2 So.2d 11, 21 (1941) (sales and use tax graduated by size of purchase upheld because the cut-off points applied equally to all).

Even if it were conceded, *arguendo*, that the $100,000 exclusion is a discriminatory classification as between large and

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[10] In this regard it is not unlike the political contribution tax credit of $50 ($100 in the case of joint returns) allowed against the federal income tax by 26 U.S.C. § 41. Small contributions of $50 or less get full advantage of the tax break, whereas larger contributors get the same advantage up to $50, but thereafter get no tax benefit.

small publications, the law would still be constitutional under either the "any rational basis" or the "strict scrutiny" standard of review.

As we have already noted, the $100,000 exclusion is not aimed at "hurting" large publishers at all, for the simple reason that its provisions are as equally beneficial to large publishers as they are to small publishers. Were the $100,000 exclusion removed, only a relatively minor tax would be collected from each of numerous small publishers but significantly increased taxes would be collected from large publishers.

Needless to say, this is not the result sought by Star Tribune. Instead, Appellant seeks to have the entire use tax declared unconstitutional, with or without the $100,000 exclusion. To the extent that this is the real object of Star Tribune's lawsuit, it becomes evident that the attack it makes on the constitutionality of the $100,000 exclusion is really a smoke screen to mask the real issue, which is the constitutionality of the basic use tax on paper and ink.

The $100,000 exclusion is nothing more than a legitimate and reasonable device which the legislature had the power to adopt as part of the basic use tax for the purpose of equitably adjusting the tax burden. *Madden v. Kentucky, supra,* 309 U.S. at 88. The Minnesota Supreme Court recognized this reality when it first discussed the constitutionality of the basic use tax as a whole. *See* Part II of the opinion below, 314 N.W.2d at 205-208 (A. 8 to A. 14). It did not deal with the $100,000 exclusion until Part III of its opinion, where the Court set forth the subordinate relationship of the $100,000 exclusion, and then held that the exclusion was not contrary to Minnesota's overall compelling state interest of raising revenue within the context of a fair tax system:

> [T]he use tax is constitutionally justified, as we said in Part II of this opinion, as a revenue-raising measure. The $100,000 exemption itself is justified if it is an integral part of the sales and use tax system.
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> * * * * *
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> [I]t is necessary for the legislature to construct economically sound taxes in order to raise revenue. In order to do so, the legislature must classify or grant exemptions to insure that the burden upon the taxpayer in paying the tax or upon the state in collecting the tax does not outweigh the benefit of the revenues to the state,

314 N.W.2d at 209 (A. 17 to A. 18).

In other words, the Minnesota Supreme Court recognized that in order to accomplish its purpose of raising revenue, the state is not bound to tax all possible sources of revenue, or none at all. *Cf. Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489 (1955).

It is well settled that if there are reasonable and legitimate grounds for making distinctions between taxpayers the legislature is free to do so, *Madden v. Kentucky, supra*, certainly under the "any rational basis" standard; and also in the context of this case under the "strict scrutiny standard". This is because the state has, as a corollary to its compelling interest of raising revenue, an equally compelling interest in seeing that its revenue is raised under an equitable system of taxation.

The reasons behind the $100,000 exclusion fit within this constitutionally acceptable category. One reason was expressly mentioned by the Court below:

> [A] use tax exemption for the first $100,000 of paper and ink consumed may be justified as a legislative policy

> to give favorable tax treatment to smaller enterprises. *Cf. Mabee v. White Plains Publishing Co.*, 327 U.S. 178, 184 (1946) (similar justification proffered).

314 N.W.2d at 209 (A. 17).

Another difference between large and small business operations is that larger businesses, by their nature, impose more social costs than do small business operations. The state would therefore have a reasonable and natural basis for imposing upon large business a greater tax burden to defray such costs.

Moreover, it is worth noting that large publishers are much more likely to be located in highly populated metropolitan areas which provide both high circulation and advertising revenue possibilities. On the other hand, small newspapers are likely to be located in predominately rural areas where circulation and advertising possibilities are clearly more limited. Because these two groups serve two different kinds of constituencies they are not in direct competition with each other for the available circulation and advertising dollar, and giving a tax break to one will not result in its gaining an unfair business advantage over the other.

As for Star Tribune's claim that this Court's decision in *Buckley v. Valeo*, 424 U.S. 1 (1976), compels a finding that the $100,000 exclusion is unconstitutional (Jur. Stat. at 14-16), we believe the Minnesota Supreme Court more than adequately answered that contention when it said below:

> *Neither the purpose nor the effect of section 297A.14 is to enhance the voice of one newspaper relative to another newspaper.* The expenditure limitations found unconstitutional in *Buckley* were restrictions upon the total amount of money that could be spent by persons during a campaign. Such limitations were "substantial

> rather than merely theoretical restraints on the quantity and diversity of political speech." *Id.* at 19. *By contrast, section 297A.14 is part of a general revenue-raising measure. Newspaper publishers are not prohibited from spending more than a given amount.* The use tax may theoretically reduce the amount of money they may spend by reducing available capital. But all taxes do as much. There is nothing special about this form of taxation which elevates to a constitutional plane these theoretical effects on "quantity" or "diversity." (Emphasis added.)

314 N.W.2d at 210 (A. 18 to A. 19).

Moreover, as we have mentioned earlier, the $100,000 exclusion herein is far more comparable to the $50/$100 political contribution credit found in the Internal Revenue Code than it is to the contribution limits found in *Buckley v. Valeo. See* fn. 10, *supra.*

Likewise, Star Tribune's contention that *Stewart Dry Goods v. Lewis,* 294 U.S. 550 (1935) is applicable herein was also more than adequately answered by the Minnesota Supreme Court below, which recognized that *Stewart Dry Goods* dealt with a totally different kind of tax than the one at issue herein. In *Stewart Dry Goods,* the tax in question was a "gross sales tax" on the privilege of doing business as a retailer, *i.e.* it was a tax on total gross receipts without taking into account either expenses or profitability. It was therefore clear that the justification for the graduated nature of tax (*e.g.* the value of the privilege increasing with volume of sales) did not bear any relation with the actual tax. The present use tax however is not based upon "privilege" or "gross receipts". It is simply a tax upon the act of purchasing and using tangible personal property, in the same manner as is the rest of Minnesota's general sales and use tax. As the Court below said:

> We do not find the reasoning of *Stewart Dry Goods* and *National Tea* persuasive in the context of this case. Section 297A.14 differs from the taxes rejected in those cases. It is not a "privilege" tax, supposedly justified because the value of the "privilege" increases in the higher brackets. Rather, the use tax is constitutionally justified, . . . , as a revenue-raising measure.

314 N.W.2d at 209 (A. 17).

E.

It is evident from the foregoing that no new questions are being presented in this appeal, for everyone agrees that *Grossjean v. American Press, supra*, is the bellwether case on the constitutional limits of a state's power to tax newspapers. The Minnesota Supreme Court recognized that fact below and, after carefully analyzing both *Grossjean* and its progeny, came to the correct conclusion that the present use tax is well within those constitutional bounds.

Since there are no new questions of law herein, it follows that no new law will be created by a full review and decision of this appeal beyond what this Court has already laid down in *Grossjean*, which still stands against any attempt by the states to muzzle or punish the exercise of First Amendment rights. But, as we have previously explained, there is in this case absolutely no suggestion or evidence that such abuses have resulted, or were intended to result, from the enactment of the present use tax on paper and ink.

Nothing in the Minnesota Supreme Court's opinion can in any way be read to weaken this Court's decision in *Grossjean*. When and if some other state ever really attempts to use its taxing power to muzzle or punish the press, the courts in gen-

eral and this Court in particular have ample ammunition in *Grossjean* to stop the assault.

CONCLUSION

For the reasons stated herein, the appeal should be dismissed for failure to present a substantial federal question.

Respectfully submitted,

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APPELLEE'S APPENDIX

13 Minn. Code of Agency Rules, Tax S&U 409

Publications

A. *In general.* The exemption of certain gross receipts from the sales and use tax provided for by Section 297A.25, Subd. 1(i) is related to publications regularly issued at average intervals not exceeding three months.

Generally the exemption applies to gross receipts from sales of:

1. tangible personal property (other than paper products or ink products), fuel, electricity, gas or steam used or consumed in the production of any such publication. (See clause C. of this regulation for rules regarding paper and ink.)
2. such publications;
3. any advertising contained in or with such publications.

Machinery, equipment, etc.; furniture and fixtures; fuel, electricity, gas or steam used for space heating or lighting are not exempt under this provision.

B. *Publication defined.* The word "publication" encompasses only written or printed matter, such as a newspaper, magazine or other printed periodical regularly issued at average intervals not exceeding three months.

"Publication" includes any legal newspaper as defined by M. S. Chapter 331, together with any supplements or enclosures accompanying such newspaper or representing a part thereof. The term "newspaper" is limited to those publications commonly understood to be newspapers and which are printed and distributed periodically at daily, weekly, or other short intervals for the dissemination of news of a general character

and of general interest. The term does not include hand bills, circulars, flyers, or the like, unless distributed as a part of a newspaper as defined. The term "publication" includes so-called "shoppers guides" distributed by a publisher, where space in such publication generally is available to advertisers for the purpose of inducing readers to purchase goods or services from such advertisers.

House organs, trade, professional and other types of magazines and journals regularly issued at average intervals not exceeding three months are included within the meaning of "publication." "Comic books" are "publications" if published serially under the same title at least once quarterly; however, comic books complete in themselves and without continuity of title and subject matter are not "publications."

The following are representative of items not included within the meaning of "publication": books, including those issued at regular or stated intervals, e.g. books sold by a book-of-the-month or other club or organizations; so called "one-shot" magazines that have no literary or subject matter connection or continuity between prior or subsequent issues' price lists; hand bills; catalogs; programs; score cards; maps; sheet music; yearbooks; directories; bulletins; political newsletters issued during a campaign only, and not of a continuing nature at regular intervals not exceeding three months; loose leaf or similar personal service publications such as tax information services, labor information services, credit or financial information services (however, special reports not distributed generally are deemed personal services), law cases and briefs; realtors' descriptive listings, financial and statistical reports, unless published as a supplement or enclosure with or part of a legal newspaper.

C. *Paper and ink.* Taxability of paper and ink products used in producing publications exempt under Section 297A.25, Subd. 1(i) should be determined as follows:

1. Purchases in period 8-1-67 through 10-31-71 are exempt;

2. Purchases in period 11-1-71 through 12-31-73 are taxable except paper and ink used as specified in 4. and 5. below;

3. Purchases subsequent to 12-31-73 in excess of $100,000.00 in any calendar year for use on any publication are taxable except when used as specified in 4. and 5. below;

4. Paper and ink used in printing an exempt publication of any exempt entity shall not be subject to tax whether such products are purchased by the exempt entity or by a printer who has contracted to print such publication;

5. The tax shall not apply to paper and ink used in printing any exempt publication as herein defined, which pursuant to a sale as defined in the Sales and Use Tax Law,

a. is mailed or shipped to an out-of-state location of an out-of-state purchaser; or,

b. is mailed or shipped to an out-of-state subscriber whether the publisher is located in or outside of Minnesota.

Paper and ink purchased for use in producing any publication by a printer who is not also the publisher may be purchased by such printer exempt from sales and use tax provided he gives to the vendor an exemption certificate prescribed by the Commissioner. The publisher of such a publication will

be subject to a use tax based upon the cost of such paper and ink products, unless he is exempt under 4. and 5. immediately above.

The person deemed to be producing a publication is the owner and operator who controls the format and who charges advertisers for the privilege of inserting advertisements in his publication, whether or not he prints such publication or pays another to do the printing.

D. *Gross receipts from advertising.* The statute specifically provides that the gross receipts from the sale of any advertising material in a publication as defined in Section 297A.-25, Subd. 1(i), shall also be exempt. It is further provided that such advertising shall be deemed to be the rendition of a service and not tangible personal property. Further, that persons or their agents engaged in the publication or sale of advertising material shall be deemed to be engaged in the rendition of a service with respect to the gross receipts realized from such news gathering or publishing activities including the sale of such advertising.